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No. 94-9088

In The

Supreme Court of the United States

October Term, 1995

MEIRL G. NEAL,

Petitioner,

vs.

UNITED STATES,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

PETITIONER'S BRIEF ON THE MERITS

DONALD THOMAS BERGERSON*
2431 Fillmore Street
San Francisco, CA 94115
Telephone: (415) 621-8149

Counsel for Petitioner

MICHAEL J. COSTELLO
COSTELLO LAW OFFICE
107 E. Allen, Suite 102
P.O. Box 182
Springfield, IL 62704
(217) 544-5500

*Counsel of Record

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QUESTIONS PRESENTED*

Does the dose-based weight calculation adopted by the Sentencing Commission for use in LSD cases apply to all aspects of sentencing in such cases, including calculation of the weight of LSD for purposes of determining eligibility for a mandatory minimum sentence?

(A) Does the Sentencing Reform Act empower the Commission, under the oversight of Congress, to define the technical phrase "mixture or substance containing LSD" in a penalty statute so as to bind sentencing courts implementing that statute?

(B) Should sentencing courts and this Court take into account the Sentencing Commission's 1993 definition of "mixture or substance containing LSD" notwithstanding this Court's 1991 decision in *Chapman v. United States*, 500 U.S. 453, which construed the phrase without benefit of the Commission's expert guidance?

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* The parties to this case in the Seventh Circuit were as captioned. In proceedings prior to Neal's initial sentence, Lyndon Harlow was a codefendant with Neal.

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Opinions Below

The opinion of the District Court appears as *United States v. Neal*, 846 F.Supp. 1362 (C.D. Ill. 1994). The opinion of the Court of Appeals appears as *United States v. Neal*, 46 F.3d 1405 (7th Cir. *en banc* 1995).

Jurisdiction

The opinion of the Court of Appeals was filed on February 2, 1995. On May 2, 1995, Neal timely filed a petition for a writ of *certiorari* [*see*, Rule 13.1 of this Court]. His petition was granted on June 19, 1995. This Court has jurisdiction under 28 USC § 1254(1).

Constitutional and Statutory Provisions

21 USC § 841(b)(1) is annexed as appendix "A".

21 USC § 3553(a) is annexed as appendix "B".

28 USC §§ 991 *et seq.*, are annexed as appendix "C".

United States Sentencing Guidelines § 2D1.1(c) fn '*' and relevant Commentary as amended 11/1/1993 are annexed as appendix "D".

Statement of the Case

A superseding indictment filed in the Central District of Illinois charged Neal with conspiracy to distribute LSD in violation of 21 USC § 846 and possession of LSD with intent to distribute it in violation of 21 USC § 841(a). The charges resulted from a series of controlled purchases of LSD mounted on blotter paper from Neal by Illinois State Police and a confidential informant. (May, 1989 PSR at

¶¶ 13-24) Neal pleaded guilty to both counts on February 13, 1989 (R.[1] 17).

21 USC § 841(b) sets penalties for LSD trafficking based on specified weights of "a mixture or substance containing a detectable amount of LSD"; the United States Sentencing Guidelines (USSG) similarly calibrate base offense levels in LSD cases to the quantity of the "mixture or substance containing" the drug. The statute further specifies that trafficking in 10 grams or more of such an LSD "mixture" triggers a *mandatory* minimum penalty of ten years imprisonment. 21 USC § 841(b)(1)(A)(v). Each count of the superseding indictment against Neal alleged that the offense involved more than ten grams of a mixture or substance containing LSD, thus implicating the ten year mandatory sentencing provision. (R. 6).

In sentencing Neal in 1989, the District Court interpreted the phrase "mixture or substance containing . . . LSD" to refer to the entire agglomeration of LSD and blotter paper; the court determined that Neal's 11,456 doses of blotter-mounted LSD weighed 109.51 grams, correlating to level 36 on the guidelines sentencing table. After adjusting downward for Neal's acceptance of responsibility[2] and factoring in his Category III criminal history, the court imposed a level 34 guidelines sentence in the lower range of 192 months, followed by a five year term of supervised release. (R. 19-20:1-3 [6/19/1989])

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[1] "R" refers to docket entries as listed in the records of the district court and the Seventh Circuit.

[2] Neal cooperated with law enforcement authorities, (May, 1989 PSR ¶¶ 25-29, 35), and admitted guilt without a trial.

In *Chapman v. United States*, 500 U.S. 453, 461 (1991), decided after Neal was sentenced,[3] this Court held that "blotter paper customarily used to distribute LSD is a 'mixture or substance containing . . . LSD' " within the meaning of 21 USC § 841(b), and therefore "it is the weight of the blotter paper containing LSD, and not the pure LSD, which determines eligibility for the minimum sentence." *Id.* at 455.

Two years after *Chapman* was decided and in response to its holding, the Sentencing Commission amended USSG § 2D1.1(c) fn. '*' so as to change the method by which drug quantity is calculated in LSD cases. In lieu of the gross weight of LSD and blotter paper carrier, amendment 488 substituted a presumptive weight of 0.4 mg. per *dose* of LSD; this weight multiplied by the number of doses yields the weight of the "mixture or substance containing a detectable amount of LSD." The reason for the amendment was that "basing the offense level on the entire weight of the LSD and carrier medium would produce unwarranted disparity among offenses involving the same quantity of actual LSD (but different carrier weights), as well as sentences that are disproportionate to those for other, more dangerous controlled substances, such as PCP." (USSG *Manual*, App. C, Amend. 488 *eff.* 11/1/1993 as USSG § 2D1.1(c)'*'; App. n. 18 and Commentary: Background ¶ 7).

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[3] Although *Chapman* had not yet been decided, the District Court which sentenced Neal had already anticipated its holding in *United States v. Marshall*, 706 F.Supp. 650 (C.D. Ill., 1989), *aff'd* 908 F.2d 1308, *aff'd* sub. nom. *Chapman v. United States, supra*, 500 U.S. 453.

The Commission determined that amendment 488 could be applied, at judicial discretion, to persons seeking retroactive sentence reductions under 18 USC § 3582(c)(2), [USSG *Manual* App. C, Amend. 502, *eff.* 11/1/1993 as USSG § 1B1.10(c)]. Neal moved in pro se for such a reduction on December 10, 1993. (R. 78) Neal contended that the weight of his LSD, as calculated in accordance with amended USSG § 2D1.1(c), was 4.58 grams. Neal sought to apply this reduced weight to the penalty statute, [§ 841(b)(1)], as well as to ascertainment of his base offense level under the guidelines; "the statutory penalty for an offense involving 4.28 (sic)[4] grams of LSD is set forth in 21 USC § 841(b)(1)(B)(v) and it provides for a mandatory minimum sentence of 5 years." (R. 78:3-4, ¶¶ 7-8). At his resentencing hearing on March 28, 1994, Neal's appointed counsel reiterated that "the weight in the guidelines should be applied to the mandatory minimum." (Tr. 3/28/1994 at 8:6-8)

The district court granted Neal's motion in part and denied it in part. Applying amendment 488 retroactively, the court recalculated Neal's base offense level at 28 and his adjusted guidelines range at 25,[5] correlating to a guidelines sentencing range of 70 to 87 months. (Updated PSR at 4-5; Tr. 3/28/1994 at 9:16-10:5) However, over Neal's objection, the court declined to impose a sentence in this range and instead imposed the statutory minimum

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[4] Neal's typographical error (4.28 instead of 4.58 grams) does not alter the sentence calculation.

[5] On resentencing, the court awarded a *three* point adjustment for acceptance of responsiblity instead of the two points Neal originally received; the Government did not cross-appeal. (Tr. 3/28/1994 at 10).

of ten years (120 months).[6] In a written opinion, the court explained that amended USSG § 2D1.1(c) fn. * applied only to ascertaining drug quantity for *guidelines* purposes, while quantity calculations for purposes of the *statute* remained governed by the gross weight formula in *Chapman*. *United States v. Neal, supra,* 846 F.Supp. 1362.

Neal appealed to the Court of Appeals for the Seventh Circuit, which affirmed the judgment of the district court in an *en banc* decision with three judges dissenting. *United States v. Neal, supra,* 46 F.3d 1405. The Court acknowledged that "[u]nder the district court's interpretation of federal law, a single amount of LSD is assigned two different weights for sentencing purposes," [*Id.* at 1408], one weight for guidelines calculations and the other for ascertaining eligibility for any mandatory minimum sentence; however, the Court believed that Congress intended this paradox because it envisioned the guidelines and the statutory minima to be different sentencing schemes. *Id.* at 1411. According to the Court, the Sentencing Commission had neither the power nor the intention of using a Guidelines amendment to overturn § 841(b)(1), which had already been dispositively construed in *Chapman* as requiring gross weight sentencing in LSD cases. The Commission had explicitly limited the scope of its amendment to calculation of "base offense level" under the guidelines and stated, in commentary which cited *Chapman*, that the amendment "does not override the applicability of 'mixture or substance' for

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[6] Pursuant to USSG § 5G1.1(b)(2), the court found the proper guidelines sentence to be the mandatory minimum sentence. (Tr. 3/28/1994 at 10:18-19)

purposes of applying any mandatory minimum sentence." Therefore, "[u]ntil the Supreme Court or Congress revisits the issue, *Chapman* governs the meaning of the term 'mixture or substance'." *Id.* at 1408-1409, citing *United States v. Boot*, 25 F.3d 52, 55 (1st Cir. 1994).[7]

Judges Ripple, Cummings, and Rovner dissented, criticizing the reasoning of the majority opinion as "circuitous" *Id.* at 1411. The Commission possesses "statutory authority to set sentencing ranges." *Id.* at 1412. Promulgation in the wake of *Chapman* of "a refinement of the earlier practice of weighing on an ad hoc basis whatever carrier the defendant happened to use," [*Id.* at 1416], was consistent with Congress' intention that the Commission would "periodically review the work of the courts, and would make whatever clarifying revisions to the guidelines conflicting judicial decisions might suggest." *Id.* at 1416, citing *Stinson v. United States*, 508 U.S. ___, 113 S.Ct. 1913, 1919 (1993). In § 841(b)(1), as interpreted in *Chapman*, Congress adopted a "market" model which based sentences on quantities of drugs in the form in which they are actually sold. However, application of this model to LSD produced sentencing disparities which the Commission was created to reduce. By "simply assign[ing] a rational and uniform weight" to the portion of LSD carrier actually mixed with the drug, the Commission rendered LSD sentences less disparate while retaining the essence of the "market" model. *Id.* at 1415-1416. In this respect, the Commission's assurance that its amendment

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[7] The Court also rejected Neal's claim that a 'dual weight' sentencing system violates the Constitutional guarantee of due process, and declined Neal's invitation to invoke the "rule of lenity" on grounds that 'dual weight' sentencing is not ambiguous. *Id.* at 1410

did "not override" *Chapman* merely stated the obvious, and the majority's conclusion that the Commission thereby meant to embrace a 'dual weight' system was "without any heed to [the] context", [*Id.* at 1413], of the Commission's commentary.

Neal's timely petition for *certiorari* was granted on June 19, 1995.

Summary of Argument

Introduction

In the Sentencing Reform Act, Congress delegated to the United States Sentencing Commission the task of assuring proportionate sentencing in Federal criminal cases. The Commission accomplishes this task by fact-finding and rulemaking procedures, including the publication of sentencing guidelines "intended to treat all classes of offenses committed by all categories of offenders consistently." S. Rep. 98-225 (S. 1762) at 51 (1983). The guidelines are adopted in partnership with Congress, which has reserved for itself six months in which to disapprove of any guideline or amendment promulgated by the Commission. The resulting guidelines are *binding* on judges, who *must* sentence in accordance with them absent permissible grounds to do otherwise. The guidelines conform to elaborate policy criteria set out by Congress and must fall within the limits of sentencing statutes passed by Congress.

One such sentencing statute, 21 USC § 841(b)(1)(A), (B), sets mandatory penalties for listed quantities of "a mixture or substance containing" various drugs including LSD. In *Chapman v. United States, supra*, 500 U.S. at 461,

this Court construed "mixture . . . containing" to encompass "blotter paper customarily used to distribute LSD." This "gross weight" approach to sentencing in LSD cases sanctioned sentences which are both proportionately longer in LSD cases than those for trafficking in other drugs (because the ratio of LSD to carrier is greater than is the case of most other drugs), and disproportionate amongst LSD traffickers (because the weight of LSD carriers varies widely).

Pursuant to its mandate to eliminate unwarranted sentencing disparity, the Commission responded to *Chapman* in 1993 by amending the Sentencing Guidelines to establish a presumptive and uniform weight per *dose* of blotter-mounted LSD. This made for shorter and more proportionate LSD sentences. At issue in this case is whether the Commission's amendment governs calculation of the statutory minimum sentences for LSD distribution.

I

Guidelines Amendment 488 was intended to, and *does*, pertain to LSD-weight calculations under both USSG 2D1.1(c) n. "*" and 21 USC 841(b)(1), and this result is permissible under the Sentencing Reform Act.

(A) In the Sentencing Reform Act, Congress created an expert administrative agency, the Sentencing Commission, and delegated to it the task of promulgating a "consistent sentencing philosophy", [S. Rep. 98-225, *supra*, at 51], by way of a guidelines system that "establish[es] sentencing policies and practices for the Federal criminal justice system." 28 USC § 991(b)(1). Congress has directed the Commission to accomplish this task by promulgating mandatory sentencing guidelines based on,

amongst other factors, categories of offenses. 28 USC § 994(a)(1), (b)(1). Pursuant to this delegation of authority, the Commission has routinely set up "sentencing practices" based on, for example, quantities of money lost or controlled substances involved. E.g., USSG §§ 2B3.1(b)(6); 2F1.1(b)(1); 2D1.1(c). Courts have never questioned the authority of the Commission to set these penalty-tiers even when they are based on interpretations of or improvisations on relevant penalty statutes. In the specific area of drug sentencing, the Courts have held that the Commission has authority to define and construe statutory terms referencing the drug mixtures which are penalized under 21 USC § 841, and to instruct courts as to how to sentence in accordance with the Commission's definitions; the courts have sustained the Commission in so doing even where the Commission's approach is not facially consistent with the text of the statute. E.g., *United States v. Shabazz*, 933 F.2d 1029 (D.C. Cir.), cert. den., 112 S.Ct. 431 (1991). In promulgating amendment 488 to USSG § 2D1.1(c) fn. *, the Commission utilized this familiar power to construe a term of art relative to calculating drug quantity.

(B) No legal principal suggests that the authority of the Commission in this regard is altered by the presence of a minimum penalty provision in the statute. The minimum sentences passed as part of the Narcotics Penalties Enforcement Act of 1986 did not explicitly diminish the rulemaking authority of the Commission, and repeals by implication are not favored. There is no inevitable conflict between Commission rulemaking and the system of mandatory minimums; Circuits routinely use Guidelines concepts to determine eligibility for mandatory minimum sentences. E.g., *United States v. Irvin*, 2 F.3d 72, 78 (4th

Cir.), cert. den., 114 S.Ct. 1086 (1993) (collecting cases). While the Commission is not empowered to rewrite a statute, its guidelines nonetheless "bind judges and courts", [*Mistretta v. United States*, 488 U.S. 361, 391 (1989)], on sentencing issues. Here, without touching the statute, the Commission reinterpreted a term of art shared by a guideline and a sentencing statute and thereby redefined the term for statutory purposes. Such rulemaking remains the normal task of the Commission and the amendment should be applied to the statute.

(C) Application of the Commission's rule to the statute is controversial – *not* because the statute precludes the Commission's definition, but because this Court already construed the statute differently in *Chapman*. Amendment 488 is "in conflict" with the statute *only* to the extent that it is in conflict with the *Chapman* construction of the statute. Respectfully, however, this Court should permit the amendment to apply to the statutory penalty provision, notwithstanding *Chapman*, out of deference to *Congress* because the Commission's new rule amounts to the latest statement of Congressional intent on the LSD-weight issue. Congress, which retains an unusual oversight and partnership arrangement with the Commission during the amendment process, [28 USC §§ 994(o),(p)], *approved* of the amendment by failing to modify or override it within the statutory period it reserved for itself to do so. Congressional acceptance of the amendment was tantamount to a Congressional "override" of the gross-weight method for LSD penalty calculation. Such an "override" need not assume the form of explicit legislation in the case of amendment 488. The text of the statute did not need to be altered to effectuate the change, and rulemaking of the sort done here is

precisely how Congress *intended* the Sentencing Reform Act to function. *United States v. Muschik*, 49 F.3d 512, 517 (9th Cir. 1995) (concerning amendment 488); *United States v. Munoz-Realpe*, 21 F.3d 375, 377 (11th Cir. 1994); *United States v. Lueddeke*, 908 F.2d 230, 233 (7th Cir. 1994).

(D) The Commission's Commentary that its "approach does not override the [*Chapman*] definition . . . for purposes of applying any mandatory minimum sentence" does not defeat the foregoing analysis. The comment may merely mean that the Commission saw no inconsistency between its rule and that in *Chapman*; other amendments promulgated by the Commission at the same time as amendment 488 fortify this assertion. At most, the commentary is inconsistent with the guideline, and therefore is of no force. *Stinson, supra*, 113 S.Ct. at 1918.

(E) The definition of crimes and the establishment of penalties is ultimately a *legislative* function. *Whalen v. United States*, 445 U.S. 684, 689 (1980). Congress has chosen to define crimes and structure penalties for Federal offenses by way of an elaborate but constitutionally valid system in which substantial factfinding and rulemaking authority is vested in the Sentencing Commission under the oversight of and in partnership with Congress. In Amendment 488, this system properly effected a *de facto* revision of the gross-weight definition of "mixture" in LSD cases. Out of deference to the power of *Congress*, this Court should approve of application of the new definition to all phases of criminal sentencing, as Congress has ordained.

II

Even if Amendment 488 did not, or cannot, directly affect the method for calculating drug quantity under the penalty statute, this Court should revisit *Chapman* in light of the Commission's expertise and persuasive authority.

(A) When *Chapman* was decided, the Commission had not yet interpreted the term "mixture containing . . . LSD", and the phrase had no common law definition, [*Chapman, supra,* 500 U.S. at 461-462]; this Court was compelled to adopt the "ordinary meaning" of the phrase, [*Chapman, supra,* 500 U.S. at 462], and ascertain to which of the two alternatives presented – the speck of pure LSD or the gross assemblage of LSD and carrier – it best pertained. Given that LSD "mixture" could not refer to *pure* LSD, and given the "market-oriented" penalty theory underlying the 1986 amendment to 21 USC § 841(b), [H.R. Rep. 99-845, pt. 1, pp. 11-12], this Court necessarily construed the phrase as referring to the gross weight of LSD and carrier. However, this Court's construction of the statute is not the *only* plausible one nor the only one in harmony with the policies underlying the penalty statute. The purpose of the 1986 Narcotics Penalties Enforcement amendments was to define drug distribution in the form in which drugs are commonly marketed, thereby differentiating between offenders at different rungs of the marketing chain so that law enforcement resources could be targeted at higher-tier offenders. The Commission's amendment serves this purpose even better than does "gross weight" sentencing. By weighing some of the blotter paper, it punishes LSD trafficking in the form in which LSD is marketed; at the same time, it eliminates the practice of misdirecting law

enforcement resources against small scale dealers whose offenses are bloated by the deceptive heaviness of LSD carriers. Moreover, the amendment is not inconsistent with the *language* of the statute, which predicates punishment on the weight of *a* "mixture or substance" and not on the weight of *the* heaviest possible "mixture."

(B) The primary goal of the Sentencing Reform Act, and of the Commission established pursuant to it, was to establish proportionality in sentencing by eliminating unwarranted sentencing disparities; the uniformity to be achieved through determinate sentencing was *reasonable* uniformity through elimination of unwarranted disparity, not the sham uniformity of "one size fits all" sentences. 28 USC §§ 991(b)(1)(B), 994(f); *see,* S.Rep. 98-225, *supra,* at 52. Cramping virtually all LSD sentences into two mandatory minimum sentences creates a sham uniformity at the expense of unwarranted disparity. It is the statutory duty of the Commission to attempt to alleviate disparity, and this was the goal behind amendment 488. Now that amendment 488 has eliminated disparity in *guidelines* sentences, it is the duty of Courts to interpret the penalty statute so as to eliminate such disparity with regard to minima as well.

Moreover, Congress intends that its various sentencing enactments be considered part of a comprehensive sentencing policy. 18 USC § 3553(a)(5)-(6); S. Rep. 98-225, *supra,* at 50-52. Congress did *not* intend to dichotomize between guidelines and penalty statutes, and did not intend that LSD sentences be internally inconsistent amongst themselves or unwarrantedly longer than sentences imposed for other equally dangerous drugs. In promulgating amendment 488, the Commission acted pursuant to *this* mandate as well. Again, however, gross-

weight mandatory minimum sentencing frustrates the goal of achieving a cohesive sentencing policy; the solution to such frustration is application of the fixed-weight calculation method of amendment 488 to ascertainment of eligibility for the statutory minimum.

(C) The Sentencing Commission is an expert administrative agency and thoroughly equipped to shed light on technical questions such as the definition of "mixture or substance" under the penalty statute. Using its expertise and fact finding powers, the Commission has promulgated a such statutory interpretation here, and its approach harmonizes the "market oriented" penalty structure of 21 USC § 841(b)(1) with the command in the Sentencing Reform Act that unwarranted sentencing disparities be eliminated, [18 USC § 3553(a); 28 USC §§ 991(b)(1)(B), 994(f)]. Courts traditionally defer to rational statutory interpretations by which agencies fill in "statutory gaps". *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). While *Chevron* does not "fit" precisely in this case because the statute at issue is a penal and not a regulatory one, the Commission is *a judicial* agency and its rulemaking may therefore be binding on courts on sentencing matters. At any rate, the Commission's amendment evidences considerable wisdom, and this Court should voluntarily reassess *Chapman* in light of such wisdom.

The foregoing doctrine applies even though Commission rulemaking comes in response to a decision by this Court rather than prior to it. Congress *intended* that Commission rulemaking would respond to judicial decisions, rather than necessarily anticipating them. *Braxton v. United States*, 500 U.S. 344, 348 (1991). Only when agency rulemaking discards longstanding judicial interpretations

limiting the scope of agency authority will *stare decisis* be invoked to cancel it. E.g., *California v. F.E.R.C.*, 495 U.S. 490, 497-500 (1990).

(D) Although amendment 488 conflicts with one technical aspect of the *Chapman* holding – that *all* of the customarily used blotter paper must be weighed in ascertaining eligibility of the offender for a mandatory sentence – this one portion of *Chapman* should be reconsidered in light of the other and more important statutory goals referenced above, including the all important goal of rationalizing sentencing, where possible, under the supervision of an expert Commission which is, in turn, supervised by Congress.

III

Should this Court decline to revisit *Chapman*, it should nevertheless find that the Commission's redefinition of "mixture" is not inconsistent with *Chapman*, and therefore can be used by Courts in calculating minimum sentences.

(A) Congress empowered the Commission to normalize sentencing practices by, *inter alia*, filling definitional "gaps" in the statute. This Court's construction of LSD "mixture" as consisting of "blotter paper customarily used to distribute LSD" as a "mixture" created such a definitional "gap" as to what paper is "customarily used". Closing the "gap" was important to the Commission since this paper weights vary widely, thus impacting on sentencing. *Chapman, supra*, 500 U.S. at 458, fn. 2; USSG § 2D1.1(c) Commentary: Background ¶ 7. The Commission solved the problem by setting a presumptive dose-based weight for blotter paper.

(B) Only the portion of blotter paper actually containing LSD particles is an LSD "mixture", the weight of which determines eligibility for mandatory penalties. The Commission has defined this portion to be .04 milligrams of each LSD-soaked quarter inch square of paper. The new definition is consistent with *Chapman* and therefore controls weight calculations under the statute.

Argument

Introduction: The Sentencing Commission and Its Powers

Although this case is a logical sequel to this Court's opinion in *Chapman v. United States*, 500 U.S. 453 (1991), the two cases involve different aspects of the law. *Chapman* was concerned with the *minutiae* of substantive criminal legislation. *This* case, on the other hand, is about the unique partnership between Congress and the agency created by it to supervise Federal sentencing policy.

The United States Sentencing Commission was created by Congress in 1984 to "promulgate and distribute to all courts of the United States . . . (1) guidelines . . . for use of a sentencing court in determining the sentence to be imposed . . . . [and] (2) general policy statements regarding application of the guidelines *or any other aspect of sentencing or sentence implementation* that in the view of the Commission would further the purposes set forth in section 3553(a)(2)[8] of title 18, United States Code." 28 USC § 994(a). Congress vested "extraordinary powers", [S. Rep. 98-225, *supra*, at 160], in the Commission to act in

[8] Section 3553(a)(2), [exhibit "C"], is the all-purpose directive that criminal sentences be just and proportionate.

this regard, authorizing it do no less than "*establish sentencing policies and practices for the Federal criminal justice system.*" 28 USC § 991(b)(1). Guidelines promulgated by the Commission are *binding* on the Federal courts in passing sentences, [18 USC § 3553(a)(4), (b)]; *Stinson v. United States, supra,* 113 S.Ct. at 1917; *Burns v. United States*, 501 U.S. 129, 133 (1991)], and are deemed to "establish a sentencing range that is consistent with all pertinent provisions of title 18, United States Code."[9] 28 USC § 994(b)(1). The Commission is empowered to amend guidelines, subject to Congressional approval, as it sees fit and *retroactively*.[10] 28 USC §§ 994(o),(p),(u).

A primary task for the Commission is the elimination of "unwarranted disparities among defendants with similar records who have been found guilty of similar conduct." 28 USC § 991(b)(1)(B); S. Rep. 98-225, *supra*, at 52. Congress intended the Commission to "constantly keep track of the implementation of the guidelines in order to determine whether sentencing disparity is effectively being dealt with," [S. Rep. 98-225, *supra*, at 178], and the former Chair of the Commission has written that elimination of disparity is "the immediate, pragmatic task – and one clearly of high priority" contemplated by Congress in

[9] The subdivision fails to mention Tit. 21, which contains the penalty provision at issue here, but "not every silence is pregnant," [*Illinois Dept. of Public Aid v. Schweiker*, 707 F.2d 273, 277 (7th Cir., 1983)]. The "pertinent provisions" most likely are those pertaining to the mechanics of sentencing, rather than specific penalty provisions.

[10] This bespeaks great trust by Congress in the Commission's expertise, since "[t]he power to require readjustments for the past is drastic." *Brimstone Railway Co. v. United States*, 276 U.S. 104, 122 (1928); *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1989).

requiring the Commission to amend the Guidelines as needed. Wilkins & Steer, *"Role of Sentencing Guideline Amendments in Reducing Unwarranted Sentence Disparity"* 50 Wash. & Lee L. Rev. 63, 69 (1993). The Commission must "pay particular attention" to this goal. 28 USC § 994(f).[11]

The instant case involves a guidelines amendment promulgated in furtherance of this goal. In *Chapman v. United States, supra,* 500 U.S. 453, 461, this Court construed the phrase "mixture or substance containing . . . LSD" to include "the blotter paper customarily used to distribute LSD." As a result, sentences for LSD trafficking remained disproportionately severe compared to those imposed for dealing other drugs. To restore proportionality, the Commission amended the Sentencing Guidelines to make LSD sentences commensurate to those for other drugs. The Commission was quite explicit that its motivation was to alleviate sentencing disparity; "[b]ecause the weights of LSD carrier media vary widely and typically far exceed the weight of the controlled substance itself, the Commission has determined that basing offense levels on the entire weight of the LSD and carrier medium would produce unwarranted disparity among offenses involving the same quantity of actual LSD (but different carrier weights), as well as sentences disproportionate to those for other, more dangerous controlled substances . . . . " USSG § 2D1.1(c) Commentary: Background ¶ 7).

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[11] Elimination of disparity is not merely a goal for the Commission, but is a principal to which each sentencing judge must adhere. 18 USC § 3553(a)(6).

At issue in this case is whether the Commission's reformatory amendment carries over to judicial determination of a defendant's eligibility for mandatory minimum sentencing. As appears below, it does.

There are three ways in which the Commission's amendment can be said to bind sentencing judges in calculating eligibility for mandatory minimum sentences under 21 USC § 841(b)(1). First, under the Sentencing Reform Act, amendment 488 constitutes the definitive, Congressionally sanctioned, definition of LSD "mixture", which supersedes the gross-weight definition heretofore attached to the statute; without authorizing the Commission to change the statute, Congress delegated to the Commission the task of interpreting the technical term "mixture . . . containing" *within the statute,* and the Commission did precisely what Congress permitted it to do. Second, the Commission possesses both meticulous technical knowledge and a wise and proportionate perspective on sentencing issues. It is therefore entitled to respect, even deference, in the courts. *This* Court can and should reassess aspects of the *Chapman* decision in light of the Commission's expert contribution on the issue. Finally, the Commission's new rule can simply be viewed as consistent with *Chapman*. Petitioner addresses these arguments in sequence.

I

PURSUANT TO THE UNIQUE PARTNERSHIP BETWEEN THE COMMISSION AND CONGRESS SET UP BY THE SENTENCING REFORM ACT, AMENDMENT 488 IS A 'CONGRESSIONAL ACTION' WHICH CHANGED THE DEFINITION OF "MIXTURE CONTAINING . . . LSD" FROM THAT SUGGESTED IN *CHAPMAN* TO THAT ARTICULATED IN THE GUIDELINES AMENDMENT

(A) The Commission Possesses Broad Power to Define Statutory Terms Relevant to Sentencing

The Sentencing Reform Act was the bipartisan "culmination of a reform effort begun more than a decade" earlier. S. Rep. 98-225, *supra*, at 37. To replace the ad hoc and disparate practices of indeterminate sentencing, Congress delegated an expert Commission the task of promulgating a comprehensive code of mandatory guidelines and equipped the Commission with substantial tools and powers to perform the task. *Id.* at 51; 28 USC §§ 994, 995. While delegation to the Commission was very broad, "[d]eveloping proportionate penalties for hundreds of different crimes by a virtually limitless array of offenders is precisely the sort of intricate, labor-intensive task for which delegation to an expert body is especially appropriate." *Mistretta v. United States, supra,* 488 U.S. at 379.

The Commission was instructed by Congress to *"establish sentencing policies and practices"*, [28 USC § 991(b)(1)], and to develop a penalty structure correlating to offense and offender characteristics and tiered along comparatively narrow "ranges" of prison time. 28

USC § 994(b)(1),(2); USSG ch. 1, pt. A § 2, ¶ 2. Accomplishing these tasks necessarily involves interpretation by the Commission of the "meaning" of statutes defining and penalizing Federal offenses; without making an assessment in this regard, the Commission would be unable to set policies and practices or to isolate particular factors which render generic offense-conduct more or less serious in a given case. In drafting the guidelines, the Commission professedly "examined the many hundreds of criminal statutes in the United States Code . . . . developed additional distinctions relevant to the application of these provisions and . . . applied sentencing ranges to each resulting category." USSG ch. 1 Pt. A § 5 ¶ 1. For example, the Commission has, from the outset, set up penalty structures for various offenses based on quantities of money lost or stolen, aliens smuggled, or taxes evaded, even though such quantities are not part of the statutory definition of the crime or penalty. E.g., USSG §§ 2B3.1(b)(6); 2F1.1(b)(1); 2L1.1(b)(2); 2T4.1 (Tax Table). At least *some* of these penalty structures appear to be based not on normative assumptions about criminal law, but on the text of the penalty statutes. For example, increasing the offense-level for bank robbery on the basis of the amount of money stolen makes particular sense in that the "victim" of an 18 USC § 2113 violation is not the *teller* but the Federally-insured *bank*. No court has questioned the legitimacy of these penalty tiers, even when they result from interpolation and improvisation on statutes which do not facially mention them; to hold that the Commission lacked power to interpret penalty statutes would cripple the Commission's ability to set out "sentencing practices" by formulation of narrow, tiered guidelines based on "offense characteristics", thus

undermining the system contemplated by Congress in the Sentencing Reform Act.

As one instance of this prerogative, the Commission has established penalty tiers for drug offenses based on the quantity of drugs involved. Here, the Commission has freely utilized its interpretative powers, typically predicating penalties on quantities of drug mixtures involved in the offense even where the penalty statutes refer to drugs in their pure form. Nevertheless, the courts have sustained the Commission's rulemaking in this regard as consistent with its statutory mission. For example, in *United States v. Shabazz, supra,* 933 F.2d 1029, the Court in an opinion authored by then-Judge Thomas, upheld the Commission in basing the penalty for distributing hydromorphone, [21 USC § 941(b)(1)(C)], on the weight of *dilaudid,* a hydromorphone *mixture* which is marketed in varying doses of equal mixture-weight; that neither the penalty statute nor the statute controlling the drug, [21 USC § 812], made reference to hydromorphone mixtures was deemed to be irrelevant, since the omission was a 'statutory gap' which Commission properly filled. The reasoning in *Shabazz* has been unanimously accepted by the circuits which have considered the issue.[12] Courts

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[12] *United States v. Limberopoulos,* 26 F.3d 245, 252-253 (1st Cir. 1994); *United States v. Gurgiglio,* 894 F.2d 56 (3rd Cir. 1990); *United States v. Meitinger,* 901 F.2d 27, 29, (4th Cir.), cert. den., 498 U.S. 985 (1990); *United States v. Bayerle,* 898 F.2d 28 (4th Cir.), cert. den., 498 U.S. 819 (1990); *United States v. Blythe,* 944 F.2d 356, 362 (7th Cir. 1991); *United States v. Young,* 992 F.2d 207, 209 (8th Cir. 1993); *United States v. Crowell,* 9 F. 3d 1452 (9th Cir.), cert. den., 115 S.Ct. 120 (1993); *United States v. Lazarchik,* 924 F.2d 211, 214 (11th Cir.), cert. den., 502 U.S. 827 (1991).

have routinely reached similar results with reference to definitions of other drugs.[13]

These cases sanction the Commission's authority to define and construe technical terms within the drug penalty statute, 21 USC § 841(b)(1). Penalties for hydromorphone distribution can only be based on the weight of pills of equal weight containing varying amounts of hydromorphone if Congress "meant" for punishment to be scheduled in this way by the Commission, acting on its expertise. But this is exactly what Congress *did* mean in the Sentencing Reform Act. Construction of terms of art within a penalty statute, *any* penalty statute,[14] was intended by Congress as the Commission's quotidian activity – the way in which the Commission sets "sentencing practices" and defines "offense characteristics". When the Commission interpreted the term "mixture containing . . . LSD" here, it did nothing extraordinary; it merely lived up to its enabling legislation.

(B) The Commission's Power to Define Terms Of Art Is Not Diminished Merely Because A Penalty Statute Provides for a Minimum Sentence

No legal principal suggests that the Commission's power to construe terms-of-art in a penalty statute is

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[13] *United States v. McKeever,* 906 F.2d 129, 133 (5th Cir.), cert. den., 498 U.S. 1070 (1990) (methamphetamine); *United States v. Taylor,* 868 F.2d 125 (5th Cir. 1989) (LSD); *United States v. Murphy,* 899 F.2d 714 (8th Cir. 1990) (methamphetamine); *United States v. Callihan,* 915 F.2d 1462 (10th Cir. 1990) (amphetamine precursor).

[14] E.g., *United States v. Arate-Nunez,* 18 F.3d 730 (9th Cir., 1994) (clarifying 8 USC § 1101(a)(43) enhancement as it applies to and violation of 8 USC § 1326(b)(2)).

diminished by the mere presence of a minimum sentencing provision in such a statute. Of course, the Commission cannot amend a statute directly,[15] and must "speak" only through guidelines. However, the proper subject-area for guidelines is very broad. The Commission is directed to use guidelines to do no less than "establish sentencing policies and practices for the Federal criminal justice system," [28 USC § 991(b)(1)], – not just for those parts of the Federal system which do not involve minimum penalties.

There is no necessary incompatibility between guidelines and mandatory minimum provisions. The two "should be reconciled to the extent legitimate and practical." *United States v. Irvin, supra,* 2 F.3d at 78 (Wilkins, J.); *United States v. McFadden,* 13 F.3d 463, 467-468 (1st Cir., 1994) (Breyer, C.J., dissenting). Mandatory penalties already existed when the Sentencing Reform Act was passed and, indeed, two such penalties were passed along with the Act itself. 18 USC § 924(c); 21 USC § 845(b) (1982 ed. Supp. II), [Pub. L. 98-473 T. II §§ 503(a), 1005(a)]. Congress contemplated the Commission would administer various forms of penalty statutes, *including mandatory penalty laws.* S. Rep. 98-225, *supra,* at 66.

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[15] Thus, the question in this case is *not* whether the Commission can "override" the ten year minimum statute; courts which have posed the question in this form have defined the issue incorrectly and have therefore inevitably arrived at the wrong answer. E.g., *United States v. Neal, supra,* 46 F.3d at 1408-1409 (7th Cir.); *United States v. Stoneking,* 60 F.3d 399, 402 (8th Cir. *en banc* 1995); *United States v. Andress,* 47 F.3d 839, 840-841 (6th Cir. 1995); *United States v. Hanlin,* 48 F.3d 121, 125 (3rd Cir. 1995); *United States v. Boot,* 25 F.3d 52, 55 (1st Cir., 1994).

Passage of mandatory sentencing provisions as part of the anti-drug abuse Narcotics Penalty Enforcement Act of 1986, [P.L. 99-570, 100 Stat. 3207], did not purport to diminish the authority of the Commission. According to the legislative history, the core purpose of the mandatory penalty provisions was to focus scarce law enforcement resources by differentiating between "kingpins", "substantial" traffickers, and small time dealers. H.Rep. 98-845, *supra,* at 11-12. A short and euphoric Senate debate also made reference to greater and surer punishment. *E.g.,* 132 Cong. Rec. S. 27181 (Biden); S. 27193 (Byrd). Nowhere, however, was anything mentioned about limiting the power of the Sentencing Commission to interpret technical terms in penalty statutes. Repeals by implication are not favored, "and will not be found unless an intent to repeal is 'clear and manifest.' " *Rodriguez v. United States,* 480 U.S. 522, 524 (1987) [citations omitted]. No clear statement of intent to repeal the Sentencing Reform Act accompanied the 1986 amendments.

Since mandatory penalties were enacted, moreover, courts have routinely used concepts developed by the Commission in its guidelines to ascertain eligibility for mandatory sentencing. For example, USSG § 1B1.3(a)(1)(B) provides that a defendant is responsible, under a "relevant conduct" theory, for foreseeable acts of those with whom he conspires; a number of courts have held that this "foreseeability" formula *also* applies to determining drug quantity for purposes of assessing a defendant's eligibility for a mandatory sentence under 21 USC § 841(b)(1)(a),(b), even though the "plain language" of the statute would suggest that each defendant is liable for the aggregate of drugs subject to the conspiracy,

"foreseeable" or not. *See*, e.g., *United States v. Irvin*, *supra*, 2 F.3d at 74-78; *United States v. Young*, 997 F.2d 1204, 1210 (7th Cir. 1993). No Circuit has disagreed with this approach.[16]

Nor could they. In none of these cases did the Commission exceed its statutory authority and purport to "amend" a statute; rather, the Commission acted *pursuant* to its directive to eliminate sentencing disparity and interpreted terms of art *within* the penalty statute with this aim in mind. This is precisely what the Commission is supposed to do, and the Courts properly followed the Commission's interpretations. To do otherwise would have dichotomized single instances of misconduct into 'misconduct under the statute', as opposed to 'misconduct under the guidelines'. Not only would this have been chaotic, but it would have frustrated *another* important goal of Sentencing Reform: the principled and uniform approach to sentencing set out in 18 USC § 3553(a)(2)].

United States v. Jordan, 842 F.Supp. 1031 (M.D. Tenn. 1994) is consistent with the approach taken in these cases. In *Jordan*, the defendants were arrested with a vial containing 13.2 grams of liquid, 0.022 grams of which was LSD, as well as with a quantity of LSD on blotter paper weighing just over seven grams. The Government sought to impose a mandatory sentence under § 841(b)(1)(A)(v), but the District Court refused. The Court noted that USSG § 2D1.1(c) App. n. 18 defined LSD in liquid as

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[16] E.g., *United States v. Madkins*, 14 F.3d 277, 279 (5th Cir. 1994); *United States v. Casteneda*, 9 F.3d 761, 769-770 (9th Cir. 1993); *United States v. Martinez*, 987 F.2d 920, 925 (2nd Cir. 1993); *United States v. Jones*, 965 F.2d 1507, 1517 (8th Cir.), cert. den., 113 S.Ct. 346 (1992).

"LSD that has not been placed on a carrier medium," and, applying this concept to the weight calculation in the case before it, arrived at a sentence weight of .022 grams of LSD.[17] *Id.* at 1033. The *Jordan* Court did not resolve the "conflict" between the statute and the guideline because it perceived no conflict to resolve; rather, it simply applied the Guidelines to its sentence calculus, just as § 3553(a)(4)(5) *commanded* it to do. *See*, also, *United States v. Turner*, 59 F.3d 481 (4th Cir. 1995) (reaching similar result).[18]

Jordan suggests that in promulgating amendment 488, the Commission did the same thing as it did with USSG § 1B1.1(a)(1)(B): it defined a term-of-art shared by the penalty statute and the guidelines in such a way as to harmonize the two penalty systems. The Commission did not purport to "amend" the statute and *need* not have done so to achieve its statutory aim. The Commission merely changed the "sentencing practice" of weighing *all* of the blotter paper in LSD cases and supplanted it with a new "practice" of assigning a fixed rational weight to such paper. Put another way, the Commission isolated-out the *real* "offense characteristics" in LSD cases and eliminated the extraneous 'characteristic' of paper-weight which had distorted the sentencing process in the past.

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[17] Alternatively, the Court ascertained the number of *doses* latent in the liquid suspension and, using the 0.4 mg. figure in the Guidelines, arrived at a sentence weight of 177.6 grams. *Id.* at 1034.

[18] The *Turner* Court acknowledged, but did not resolve, the "mandatory minimum problem" because the issue was not briefed and the case was remanded anyway.

This is precisely the task Congress delegated to the Commission; any lesser assessment of the Commission's role contravenes the plain text of the Sentencing Reform Act.

(C) The Commission's Amendment Redefined the Meaning of LSD 'Mixture' Notwithstanding *Chapman* Because Congress Approved of the New Definition

What makes this case different from the foregoing decisions is that *here*, the Commission does not write on a clean slate; this Court has already construed § 841(b)(1) in *Chapman* in a manner different from that advocated by the Commission. However, petitioner most respectfully suggests amendment 488 is applicable to the penalty statute notwithstanding *Chapman*, for reasons as follow.

Chapman construed a technical term in a penalty statute enacted by Congress. There is no question that *Congress* could, by articulating a different definition for that term, "override" *Chapman*, since the setting of criminal penalties is a Congressional function. *Whalen v. United States*, 445 U.S. 684, 689 (1980). That function can be delegated, however. *E.g., Touby v. United States*, 500 U.S. 160 (1991) [Attorney General can specify drug offenses]; *Yakus v. United States*, 321 U.S. 414 (1943) [OPA can criminalize price control violations]; *United States v. Grimaud*, 220 U.S. 506 (1911) [Agriculture Department can criminalize land use violations]; 10 USC § 856 [penalties under military Code can be set by executive]. The Sentencing Reform Act did not delegate the power to define crimes *per se*. Rather, Congress delegated to the Sentencing Commission broad power to establish sentencing norms and policies for the Federal courts. As indicated in § I(A), *ante*, included in the delegation was the power to define

"offense characteristics" with reference to and through interpretation of, penalty statutes. As with any delegation, Congress must set sufficiently definite standards over the agency's actions, [*Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 219 (1989); *National Cable Television Assn. v. United States*, 415 U.S. 336, 342 (1974)], or the delegation will fail to pass Constitutional muster. However, in *Mistretta v. United States, supra*, 488 U.S. at 379, this Court found that the elaborate substantive and precatory criteria set out in 28 USC §§ 994(b)-(o) " 'are wholly adequate for carrying out the general policy and purpose' of the [Sentencing Reform] act." (Citing *Sunshine Coal Co. v. Adkins*, 310 U.S. 381, 398 (1940)).

Confidence that the Commission will act as a responsible delegate and will not exceed the scope of its delegation is rooted to a large degree in the unusual amount of Congressional oversight over the Commission provided for in the Sentencing Reform Act. 28 USC § 994(p) imposes a six month 'gestation' period between proposal of a guideline amendment by the Commission and its ultimate promulgation; the amendment cannot go into effect if Congress modifies or bars it during that interval. The Commission "is fully accountable to Congress which can revoke or amend any or all of the Guidelines as it sees fit." *Mistretta, supra*, 488 U.S. at 393-394. In *Stinson v. United States, supra*, 113 S.Ct. at 1918, this Court stated that although promulgation of guidelines was akin to ordinary agency rulemaking, "the analogy is not precise because Congress has a role in promulgating guidelines." Other Courts have described Congress' role in the

amendment process as sufficient to render the amendments "subsequent Congressional action."[19] *United States v. Munoz-Realpe, supra,* 21 F.3d at 377. Congressional acquiescence to an amended guideline means that "Congress itself thought the Guidelines were not inconsistent enough with its mandate . . . so as to require change."[20] *United States v. Leuddeke, supra,* 908 F.2d at 233. At any rate, it is clear that Congress has a close, almost osmotic relationship to the Commission in the amendment process, and the Commission "speaks" for Congress to an unusual degree in the substantive content of its guidelines amendments.[21] For this reason, the Court in *United States v. Muschik, supra,* 49 F.3d at 515-516 held that

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[19] Petitioner is mindful that the Second Circuit rejected this view in *United States v. Palacio,* 4 F.3d 150 (2nd Cir.), cert. den., 114 S.Ct. 1194 (1994). *Palacio* is less persuasive than *Munoz-Realpe*. *Palacio* relied on a phrase in *United States v. Smith,* ___U.S.___, 113 S.Ct. 2050, 2055 (1993) – "the dubious assumption that the Sentencing Guidelines are relevant in the present context" – to imply that the Commission's interpretation of a statute is not entitled to deference. This contradicts the unanimous view of the Circuits including the one which decided *Palacio*. [§ I(A),(B) *ante*]. *Smith* did not even involve the *issue* of whether the Commission can interpret statutory terms of art.

[20] Even without the unusual oversight provisions of § 994(p), "Congress' failure to repeal or revise in the face of . . . administrative interpretation has been held to contribute persuasive evidence that that interpretation is the one intended by Congress." *Zemel v. Rusk,* 381 U.S. 1, 11 (1965).

[21] Congress' sentencing legislation is, in turn, influenced by the Commission, which must recommend changes in existing law "whenever it finds it advisable". 28 USC § 994(r). Congress can also avail itself of the Commission's various investigatory and factfinding activities with regard to Federal sentencing. 28 USC § 995(a).

amendment 488 was applicable to § 841(b)(1) because it represented the views of Congress.

In summary, with the passage of the Sentencing Reform Act, Congress explicitly delegated to the Commission the power to interpret penalty statutes so as to establish "offense characteristics" under the guidelines. However, Congress reserved for itself the power to cancel *any* guideline which it felt exceeded the scope of the delegation or which did not substantively reflect the sense of Congress. Congress did not interfere with the new definition of "mixture" promulgated by the Commission. It is fair to conclude that Congress sanctioned rulemaking by the Commission which defined a term-of-art in a mandatory penalty statute, *and* that Congress approved of the substantive content of the rule. Without the need for formal revision of 21 USC §§ 841(b)(1)(A), (B), amendment 488 should therefore be used in calculating eligibility for mandatory minima under that statute.

(D) Commission Commentary that Amendment 488 Does Not "Override" *Chapman* Should Not Be Interpreted to Negate The Substantive Impact of the Guideline Itself

Commentary of the Sentencing Commission is given dispositive weight unless in conflict with the Constitution, the statute, or the guideline itself. *Stinson v. United States, supra,* 113 S.Ct. at 1918-1920. In Commentary annexed to amendment 488, the Commission stated that it "has established a weight per dose of 0.4 milligram for purposes of determining the *base offense level* (emph. added), and that its "approach does not override the applicability of 'mixture or substance' for purposes of applying any mandatory minimum sentence, (*see,*

Chapman; § 5G1.1(b)). According to the Court of Appeals, this Commentary means that "the Commission promulgated Amendment 488 in full recognition that it would create a 'dual weight' system of calculating the weight of LSD." *United States v. Neal, supra,* 46 F.3d at 1408. As such, "[e]ven if an amendment to the Sentencing Guidelines could supersede the Supreme Court's interpretation of a separate statute, these two sentences make clear that the amendment to § 2D1.1 purported to do no such thing." *Id.,* at 1409.[22]

However, "[t]he sentence is obscure. What the Commission meant by it is difficult to fathom." *United States v. Kinder,* 95 US App. LEXIS 22592 at 35-36 (2nd Cir. No. 94-1333, Aug. 16, 1995), (Leval, J., dissenting). To the dissent in *Neal* below, the Commentary was primarily a factual observation that amendment 488 was not inconsistent with the core holding of *Chapman* that some portion of the carrier be included in the sentence calculus so as to reflect the "market oriented" premise behind the mandatory minimum statute. *Neal, supra,* 46 F.3d at 1412, 1413-1415. For Judge Leval in *Kinder, supra,* 95 U.S. App. LEXIS 22592 at 35-36, "the sentence signifies merely a recognition by the Sentencing Commission of the limits of its authority and undertaking . . . a recognition that however the courts interpret the mandatory sentence statute, its command will of course prevail over guideline

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[22] *See,* also, *United States v. Kinder* (No. 94-1333, 95 US App. LEXIS 22592, at 5) (2nd Cir. August 16, 1995); *United States v. Andress,* 47 F.3d 839, 840-841 (6th Cir. 1995); *United States v. Pardue,* 36 F.3d 429, 431 (5th Cir. 1994), cert. den., 115 S.Ct. 1969 (1995); *United States v. Boot, supra,* 25 F.3d at 55; *United States v. Stoneking,* 60 F.3d 399, 402-403 (8th Cir. *en banc*), cert. pending, (1995); *Woolston v. United States,* 840 F.Supp. 1, 2 (D.Me. 1993).

prescriptions." The four dissenting judges in the Eighth Circuit considered the sentence in context of the full Commentary, as well as contemporaneous amendments, as meaning simply that the Commission intended to adhere to *Chapman. Stoneking, supra,* 60 F.3d at 408, Beam, J., dissenting.

This is probably an accurate observation. Contemporaneous with its adoption of amendment 488, the Commission promulgated another amendment, [USSG *Manual* App. C amend. 484 eff. 11/1/1993 as USSG § 2D1.1 App. Note 1], which exempted from the definition of "mixture" drugs rendered temporarily useless by being "mixed" with other substances such as packaging materials or waste. Some circuits had ruled that the entire weight of these useless amalgams should be included in the mandatory sentence, but the Commission felt that nonusable amalgams should not be weighed because they had no "market-oriented" value *within the meaning of Chapman.* Amendment 488, which includes some but not all LSD carrier as a result of "market-oriented" analysis, is consistent with the Commission's view of *Chapman.* It is very likely that *this* is all that the Commission meant when it said that it did not intend to "override" *Chapman*; certainly, the odd locution of the "not override" passage does not suggest otherwise. It is also noteworthy that amendment 484 begins with the statement that " 'mixture or substance' as used in this guideline has the same meaning as in 21 USC § 841, *except as expressly provided.*" (emph. added). Whatever else it does, the Commentary to amendment 488 does not "expressly" differentiate between LSD weight for statutory and guidelines purposes. This indicates that the Commission did not intend to make such a differentiation.

Only if read "without any heed to context," [*Neal, supra,* 46 F.3d at 1413, Ripple, J., dissenting; *Stoneking, supra,* 60 F.3d at 408, Beam, J., dissenting], can the two passages in the Commentary be construed to undermine the elaborate factfinding and thoughtful rulemaking by which amendment 488 was promulgated. The Commission was surely mindful that Congress ratified the *guideline*, not the Commentary, and that commentary which contravenes a guideline is void, [*Stinson, supra,* 113 S.Ct. at 1918]. "What earthly sense would it then make for the Commission to command that courts not use this enlightened method when formulating statutory sentences?" *Kinder, supra,* 95 US App. LEXIS 22592 at 37, (Leval J., dissenting). Isolated fragments in the Commentary ought not to overwhelm the plain applicability of the guideline to sentence calculation under 21 USC § 841(b)(1).

(E) Summary: Amendment 488, Which Reflects the Sense of Congress On the Authority of the Commission and Regard to the Meaning of "Mixture", Should Govern Calculations Under the Statute

The definition of crimes and the establishment of penalties is ultimately a *legislative* function. *Whalen v. United States, supra,* 445 U.S. at 689. But Congress cannot suspend the business of the nation to pass new legislation every time a technical ambiguity or court case crops up concerning a penalty statute.[23] That is why Congress

[23] It is unlikely that Congress would view the blotter paper issue as big enough to warrant special legislation; the Commission reports only about 200 LSD cases in the Federal courts during fiscal years 1992-1993 and 1994. USSC Annual Reports,

created the Sentencing Commission. To prevent the Commission from overreaching, Congress has reserved for itself a degree of oversight unusual if not unique in administrative jurisprudence. Using that oversight, Congress allowed amendment 488 to take effect.

The amendment was a model for Commission rulemaking. The result of careful investigation, it secured proportionality (the aim of the Sentencing Reform Act), even as it secured a "market-oriented" approach to penalty (as ordained by the penalty statute and *Chapman*). Sentencing reform cannot work unless the Commission is permitted to interpret penalty statutes so as to promulgate meaningful and proportionate guidelines based on characteristics of the offense. The alternative is a full time Sentencing Congress or ad hoc chaos in the courts. This Court should adhere to Congress' multifaceted intent, and reverse the judgment of the Seventh Circuit.

II

THIS COURT SHOULD REVISIT *CHAPMAN* IN LIGHT OF THE COMMISSION'S EXPERT RULEMAKING AND ADOPT AMENDMENT 488 AS THE DEFINITIVE CONSTRUCTION OF "MIXTURE . . . CONTAINING" WITHIN THE MEANING OF 21 USC 841(b)(1)(A), (B)

Whether or not the Sentencing Commission has the *power* to command application of its guideline to calculation of the mandatory minima in 21 USC § 841(b)(1),

pp. 137, 154 Tables 52, 63 (1993), p. 105 Table 44 (1994). LSD offenses account for just over 1% of all Federal drug crimes. *Id.* (1994 ed.) at 40.

"courts may [nonetheless] borrow wise solutions promulgated by the relevant administrative agency in determining a closely related issue." *United States v. Kinder, supra,* 95 US App. LEXIS 22592 at 39, Leval, J., dissenting. The Commission's reinterpretation of the technical term "mixture or substance containing . . . LSD" was a "wise solution" to the sentencing disparity and debasement of Congress' 1986 "market" model caused by gross weight sentencing in LSD cases. Gross weight sentencing was sanctioned by this Court in *Chapman* before the Commission applied its expertise to the technical and policy problems caused by it. Now that the Commission has spoken to the issue, petitioner respectfully requests this Court to reconsider aspects of its *Chapman* holding.[24]

(A) The Construction Adopted By This Court in *Chapman* Is Not The Sole Plausible Construction of the Statute

This Court's interpretive options in *Chapman* were limited by the question actually posed in that case. The statutory question in *Chapman* was whether carrier media should be included in the weight of the "mixture or substance containing . . . LSD" for sentencing purposes under 21 USC § 841(b)(1). (*Chapman,* Pet. Cert. at i; Pet. Br. at i, 9, 44) Since the statute did not itself define "mixture or substance" and the phrase had no established common law meaning, this Court had to resolve the question by looking at the ordinary meaning of the

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[24] Various Courts of Appeals which have ruled on the instant issue have also suggested that this Court might wish to reconsider *Chapman*. E.g., *Kinder, supra,* 95 U.S. App. LEXIS 22592 at 9; *Neal, supra,* 46 F.3d at 1409; *Boot, supra,* 25 F.3d at 55.

words. *Id.* at 461-462. Because "mixed" *cannot* mean "pure," Chapman's contention that "section 841(b) should not require that the weight of the carrier be included," [*Id.* at 458], was simply not "plausible." *Id.* at 459. This Court did *not* purport to explore or exhaust the range of other plausible interpretations of the phrase. Rather, this Court resolved the case actually before it, holding that the petitioners could not prevail because the statute was susceptible of dictionary interpretation and suffered no "grievous ambiguity or uncertainty." *Id.* at 463 (citation omitted).

The statutory interpretation at which the Commission arrived was *as* reasonable and *as* consistent with Congressional intent as was the gross-weight "dictionary" approach sanctioned in *Chapman*. As did this Court in *Chapman, supra,* 500 U.S. at 461, the Commission started with the premise that "Congress took a 'market-oriented' approach to punishing drug trafficking under which the total quantity of what is distributed, rather than the amount of pure drug involved, is used to determine the length of the sentence." Using its expertise, the Commission went beyond gross weight sentencing so as to conform LSD sentences even more to market *realities*. Specifically, the Commission chose to weigh *some* of the LSD carrier "[b]ecause LSD is marketed and consumed orally on a carrier medium." USSG § 2D1.1(c) Commentary: Background ¶ 8. However, because the actual weight of the carriers varies widely and LSD can be carried on heavy non-traditional carriers, [*Id.*; *Chapman, supra,* 500 U.S. at 458; *see, United States v. Lowden,* 955 F.2d 128 (1st Cir. 1992) (LSD in water)], the Commission felt it

rational to assign a fixed presumptive weight lest adventitious variations in carrier weight from case-to-case distort Congress' overall intent that drug penalties be based on the *realities* of the market.

This approach is thoroughly in accord with settled principles of statutory interpretation. "Plain meaning" of legislation is to be ascertained in the context of "the language and design of the statute as a whole." *Crandon v. United States*, 494 U.S. 152, 158 (1990); *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 714, 722-723 (1989). *"A"* mixture containing LSD need not be equated with *"the"* heaviest possible amalgam of drug and carrier when the expansive interpretation yields results which warp the statutory design. The Commission's contextual interpretation of § 841(b)(1) is, if anything, *closer* to the statutory design than is gross weight sentencing.

(B) Congress Desires That Criminal Sentencing Be *Proportionate* and Consistent. Amendment 488 Serves This Goal, but Restricting Its Rule to the Guidelines Results In Worse Distortion Than Before

A deeper "context" for the 1986 Anti-Drug amendments can be found in the Sentencing Reform legislation passed only two years earlier and contemplated to govern *all* Federal sentencing practices, including mandatory minimum penalties.

The Sentencing Reform Act climaxed a decade-long Congressional effort to attain a just and uniform sentencing policy.[25] However, the resulting legislation

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[25] *See*, gen., Nagel, *Foreword: Structuring Sentencing Discretion: The New Federal Sentencing Guidelines* 80 J. Crim. L. &

commanded neither pure "justice"[26] nor absolute "uniformity"; the statutory directive to the Commission was to achieve *proportionality* through the reduction of unwarranted sentencing disparity. 18 USC § 3553(a)(2); 28 USC §§ 991(b)(1)(B), 994(f). When passing sentence, judges *must* attempt to avoid unwarranted disparity. 18 USC § 3553(a)(6).

The other overriding goal of the Sentencing Reform Act was development of a *cohesive* sentencing system. The Act, "a comprehensive statement of the Federal law of sentencing," [S. Rep 98-225, *supra*, at 50], requires that sentences reflect the relative gravity of the offense, [28 USC § 3553(a)(2)(A)], and established a "grading scheme by which each offense can be ranked according to its relative seriousness." S. Rep. 98-225 at 51; 18 USC § 3581(b).[27]

The Commission is required to adhere to the principle of cohesiveness in fashioning sentencing policy. 28 USC § 991(b)(1)(A). Congress contemplated that guidelines promulgated by the Commission would possess such an internal logic. S. Rep 98-225 at 168. From the outset, the Commission used empirical studies to develop "a coherent sentencing system," [USSG ch. 1 pt. A § 3

Criminology 883 (1990); Stith and Koh, *Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines* 28 Wake For. L.Rev. 223 (1993).

[26] *I.e.*, a so-called "just deserts" approach which bases punishment on blameworthiness. [*See*, Breyer, *The Federal Sentencing Guidelines and the Key Compromises on Which They Rest* 17 Hofstra L.R. 1, 15-16 (1989); Nagel, n. 21, *ante.*, at 898-899].

[27] Cohesiveness in sentencing policy is an abiding concern of Congress, which reiterated the goal as recently as last year. *See*, H.R. Rep. 103-711 at 388-389, 391, 392 (1994).

¶ 11, § 5 ¶ 1; *see*, Breyer, *Compromises, supra*, 17 Hofstra L.R. at 16-18], which reduced "the hundreds of overlapping and duplicative statutory provisions" into "guidelines that are descriptive of generic conduct." *Id.* at § 4(a) ¶ 3. The drug penalties in the Guidelines reflect this philosophy; "the base offense levels in § 2D1.1 are either provided directly by the Anti-Drug Abuse Act of 1986 or are proportional to the levels established by statute, *and apply to all unlawful trafficking.*" USSG § 2D1.1 Commentary: Background ¶ 2 (emph. added). Moreover, guideline sentence ranges correlate with the statutory minimum provisions, *i.e.*, ten grams of LSD mixture trigger both a ten year statutory minimum and a ten year guidelines sentence. Amendment 488 changed the method of calculating ten grams, but this coordination remains *un*changed in the amended Guideline.

Congress no doubt believed that coherence and proportionality could best be achieved by settling minute or technical sentencing questions at the *Commission* level rather than on a non-uniform, case-by-case basis in the Courts. Amendment 488 aimed at doing just that. The amendment was explicitly aimed at reducing sentencing disparity not only amongst dealers trafficking in identical quantities but different weights of LSD, but between LSD and other drugs. USSG § 2D2.1D Commentary: Background ¶ 7. To restore proportion and coherence to the sentencing array, the Commission assigned a fixed weight to the carrier medium and thereby calibrated LSD sentences to be slightly less severe than those for trafficking in phencyclidine (PCP), "a controlled substance that comparative assessments indicate is more likely to induce violent acts and ancillary crime than is LSD." *Id.* at ¶ 8. The result "harmonize[d] offense levels for LSD offenses

with those for other controlled substances and avoid[e]d an undue influence of varied carrier weight on the applicable offense level." *Id.*

Ironically, what was intended as a means of insuring proportionality has become, by virtue of the refusal of courts to export the calculation method of the amendment to the statute, an exemplar of unwarranted disparity. Almost *all* LSD sentences are crammed into the procrustean bed of the mandatory penalty statute rather than graduated in accordance with the guidelines. Dealers with just over a thousand doses of LSD[28] receive the same penalty as those with twenty five thousand doses. By contrast, traffickers in PCP, the very drug the Commission said was worse than LSD, continue to receive graduated and lesser sentences. More: dealers who sell their LSD before they are caught have no paper to weigh and therefore are given "pure" guidelines sentences; this "reward" to those who insert their LSD into the stream of commerce is a wicked perversion of Congress' "market oriented" penalty structure.

The "dual weight" scheme is inimical to the intent of Congress, which "sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity." USSG ch. 1 pt. A § 3 ¶ 2. "While a very simple system may produce uniformity, it cannot satisfy the requirement of proportionality . . . . [T]he Commission ostensibly could have achieved perfect uniformity by specifying that

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[28] For example, 1175 doses of the LSD distributed in *United States v. Healey*, 729 F.Supp. 140, 141 (D.C. Cir., 1990) would have weighed 10 grams triggering a mandatory minimum of ten years, [*see, Chapman, supra*, 500 U.S. at 458, fn. 2].

every offender was to be sentenced to two years imprisonment." USSC *Supp. Rept. on Initial Sent. Guidelines and Policy Statements* ch. 3, § A, ¶ 2 (June, 1987). Yet sham uniformity, the very *opposite* of what Congress intended, is the inevitable result of vestigial gross-weight sentencing in LSD cases.

It is not the Commission's *amendment* which creates the disparity, but gross-weight sentencing. This was acknowledged even at the time of *Chapman, supra,* 500 U.S. at 458. When *Chapman* was decided, however, the Commission had not yet recognized or attempted to *correct* the disparity. Now that the Commission has done so, it is appropriate for the Court to complete the Commission's work.

(C) The Commission Has Persuasive Expertise On Technical Questions Such As the Meaning of LSD "Mixture"

Had the Commission spoken prior to *Chapman*, this Court likely would have listened carefully. Indeed, this Court looked to the Commission for guidance before deciding *Chapman*. *Id.* at 462.

This is entirely in keeping with the esteem with which the judiciary properly regards administrative agencies. Such agencies bring the "cumulative expertise", [*Fahey v. Mallonee*, 332 U.S. 245, 250 (1947)], to their areas of endeavor. The Sentencing Commission is particularly deserving of high regard. Congress intended that, in light of its "extraordinary powers and responsibilities", the Commission would possess "the highest quality of membership," [S. Rep. 98-225, *supra,* at 160], and Congress equipped the Commission with impressive investigative and analytical resources. 28 USC §§ 995(a)(8), (9), (10),

(12), (15), (16), (20), (21), (22). Moreover, Commission rulemaking, such as preceded promulgation of amendment 488, is preceded by plenary notice-and-comment. 28 USC § 994(x).

This Court has a long-settled policy of deferring to reasonable agency interpretations of "gaps" in statutory schemes administered by them. *Stinson v. United States, supra,* 113 S.Ct. at 1918, citing *Chevron U.S.A., Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837, 842-843 (1984). Invocation of the *Chevron* doctrine is not without difficulty in the instant case because § 841(b)(1) is a *criminal* statute administered not by the Commission but by the Courts. *See, Crandon v. United States, supra,* 494 U.S. at 177 (1990) (Scalia, J., concurring), but *see, United States v. Shabazz, supra,* 933 F.2d at 1035. On the other hand, the Commission is "located" in the judiciary, [28 USC § 991(a)], and "the role of the Commission in promulgating guidelines for the exercise of that judicial function bears considerable similarity to the role of this Court in establishing rules of procedure." *Mistretta v. United States, supra,* 488 U.S. at 391. Further, Commission guidelines are statutorily afforded not merely deferential, but *obedient*, reception in the courts.

However, even if *Chevron* is not technically apposite to the instant and unique question, there is no obstacle to prevent this Court from deferring *voluntarily* to the Commission's "wise solution" to the LSD sentencing problem. The Courts of Appeals have done so. *E.g., United States v. Hill,* 48 F.3d 228, 231 (7th Cir., 1995) (Posner, J.) (nonbinding Commission policy statements are "entitled to great weight because the Sentencing Commission is the expert body on federal sentencing."); *United States v. Sparks,* 19

F.3d 1099, 1101 (6th Cir., 1994) (same). Even if the Guidelines cannot break out of the confines of the penalty statute or *Chapman*, the statutory mandate of the Commission is not limited to promulgating guidelines; its core mission is to develop "sentencing policies and practices" implementing the goals of 18 USC § 3553(a)(2) and assuring fairness and proportionality. 28 USC § 991(b)(1) This Court has every reason to listen closely when the Commission speaks, through its guidelines, on such issues.

Petitioner is unaware of any authority suggesting that the foregoing analysis should not apply when, as here, Commission rulemaking responds to a decision by this Court rather than anticipating it. Indeed, Congress *intended* that the Commission act in this fashion. *Stinson, supra,* 113 S.Ct. at 1919; *Braxton, supra,* 500 U.S. at 348. While *stare decisis* can, of course, overcome agency rulemaking, the doctrine has traditionally been reserved to overturn agency arrogance which flies in the face of longstanding judicial interpretations which limit the scope of agency authority and which have been ratified by Congress. *E.g., Maislin Industries, U.S. v. Primary Steel, Inc.*, 497 U.S. 116, 132-136 (1990); *California v. F.E.R.C.* 496 U.S. 490, 497-500 (1990). Here, by contrast, the Commission acted in immediate response to judicial rulings construing a statutory phrase which Congress had not explicitly defined. Tellingly, moreover, Congress approved of the Commission's amendment. *See,* § I(C) *ante.*

(D) This Court Should Modify *Chapman* In Light Of The Commission's Expertise

Although reassessment of *Chapman* in light of amendment 488 may lead to modification of that decision, the

modification is a modest one. Still intact will be a core principle in *Chapman*: that courts must give meaning and effect to every word in a statute passed by the legislature in a democracy; LSD punishments will still be based on the weights of LSD "mixtures". Also surviving intact will be the "market oriented" policy underlying 21 USC § 841(b)(1); indeed, Congress' "market" approach will be *furthered*.

Finally, reassessment of *Chapman* will enable this Court to implement the provisions *and the spirit* of the Sentencing Reform Act and the remarkable Commission created under it. When Congress created the Commission, it intended to rationalize sentencing policy under the governance of a single expert agency. One apparent goal was to conserve judicial resources so that every technical question did not provide grounds for litigation and appeal. Here, the Commission solved a technical problem and rationalized LSD sentencing in harmony with all of the relevant statutes. Sound judgments by the Commission should be embraced by the judiciary. Cf., *Stinson v. United States, supra,* 113 S.Ct. 1913. This Court should follow the Commission's lead and reconsider *Chapman*.

III

AMENDMENT 488 IS CONSISTENT WITH *CHAPMAN*, AND THUS APPLIES TO WEIGHT-CALCULATIONS UNDER THE MANDATORY MINIMUM STATUTE

"Congress necessarily contemplated that the Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest."

Braxton v. United States, supra, 500 U.S. at 348. The Commission fulfilled this mission with a new guideline which is both responsive to and consistent with *Chapman*.

(A) Amendment 488 Merely Defines "Blotter Paper Customarily Used to Distribute LSD"

In *Chapman, supra,* 500 U.S. at 461, this Court held that "the blotter paper used in this case, *and blotter paper customarily used to distribute LSD,* is a 'mixture or substance containing a detectable amount of LSD'." The phrase "customarily used" is essential to the *Chapman* holding and marks its outer boundaries. Basing minimum sentence eligibility on the weight of *unusual* blotter paper, *i.e.,* paper which is unusually heavy or only a small fraction of which is saturated with LSD, poses intolerable risks. For this reason, this Court exempted "hypothetical cases . . . involving very heavy carriers and very little LSD", [*Id.,* at 466], and carriers "clearly not mixed or otherwise combined with the drug," [*Id.,* at 463], from its holding. In this way, due process problems are avoided. *Id.* at 466.

Just what constitutes a "standard carrier", *i.e.,* "blotter paper customarily used to distribute LSD", was not defined in *Chapman*. A precise definition remained elusive because "the weights of LSD carrier media vary widely." USSG 2D1.1(c) Commentary: *Background* ¶ 7; *Chapman, supra,* 500 U.S. at 458, fn. 2, [different paper weights cause blotter papers sentences to vary]. These factors also make actual sentences in LSD cases disparate from one another and from sentences imposed for other drugs, which was the rationale for promulgation of amendment 488.

The "definitional gap" created by *Chapman* applied to *both* the statute *and* the Guidelines. As indicated in § I(A), *ante,* this was a "gap" the Commission has unquestioned power to fill. After notice to, and comment from, the public and interested agencies, the Commission normalized calculation of the weight of blotter paper customarily used to market in LSD by way of amendment 488. Nothing in either 21 USC § 841(b) or *Chapman* is inconsistent with the Commission's new definition, and courts *must* defer to it. *See, Chevron, supra,* 467 U.S. 837. Far from being inconsistent with *Chapman,* therefore, the Commission's amendment *implements* its rule, and therefore should be applied to the statute.

(B) Consistent With *Chapman,* Amendment 488 Defines How Much of a Piece of Typical Blotter Paper Constitutes a "Mixture"

21 USC 841(b)(1) predicates sentences for trafficking in specified street drugs on the quantity of the drug *mixture* involved in the trafficking scheme.

In *Chapman, supra,* 500 U.S. at 462, this Court explained that blotter paper and LSD form a "mixture" because "[a]fter the solvent evaporates, the LSD is left behind in a form that can be said to 'mix' with the paper. The LSD crystals are inside of the paper, so that they are commingled with it, but the LSD does not chemically combine with the paper. Thus, it retains a separate existence and can be released by dropping the paper into a liquid or by swallowing the paper itself. The LSD is diffused among the fibers of the paper." By contrast, it is "nonsense" to describe LSD in glass or metal containers as a "mixture" because "[t]he drug is clearly not mixed

. . . nor . . . chemically bonded" with such containers. *Id.* at 462-463.

This means that not every *entire* piece of blotter paper containing LSD is a "mixture". "For example, if a drop of LSD were deposited onto one corner of a sheet of paper, the opposite corner would not contain any particles of the pure drug, so would not be part of the 'mixture'." *Stoneking, supra,* 60 F.3d at 407 (Beam J., dissenting). Whatever isolated portions of *Chapman* might loosely be read to say otherwise, [e.g., *Id.* at 468], such *could not* be the law, since the statute permits weighing only the *mixture.* At most, *Chapman* means that gross weight of the blotter paper is a rational *proxy* for the weight of the LSD "mixture". However, *Chapman* was decided against a background of silence by the Commission which has now advanced a "third option: . . . an assigned rational weight for the calculation of sentences." *United States v. Muschik, supra,* 49 F.3d at 516; *Stoneking, supra,* 60 F.3d at 407 (Beam, J., dissenting). "[T]he assignment of a uniform rational weight to LSD on a carrier[29] does not conflict with *Chapman.*" *Muschik, supra,* 49 F.3d at 516; *Neal, supra,* 46 F.3d at 1416 (Ripple, J., dissenting). "*Chapman* is simply neutral as to this question." *United States v. Kinder, supra,* 95 US App. LEXIS 22592 at 28 (Leval, J., dissenting (1995)). Further, as previously indicated, *Chapman,* 500 U.S. at 458 was decided in deference to Congress' "market-oriented approach" to street-drug sentencing, and

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[29] Whether this is seen as assignment of a fixed weight of .35 grams to the *paper* and a "real" weight of .05 grams to the LSD, (R. 81:3 ¶¶ 2-3), or a net of .4 mg. to the entirety has no impact on this argument.

amendment 488 accommodates, even furthers, this approach. *Muschik, supra,* 49 F.3d at 516.

Again, amendment 488 has been shown to implement rather than conflict with *Chapman*'s holding as to the meaning of "mixture or substance" in 21 USC § 841(b). The judgment should be reversed to permit Neal to be resentenced in accordance with the amended guideline.

Conclusion

In promulgating amendment 488, the Sentencing Commission did precisely what Congress intended it to do. Using its expertise, the Commission made a modest change in the "sentencing practice" associated with a technical term. By so doing, the Commission realigned LSD sentences with both the 1986 penalty statute *and* the Sentencing Reform Act. No *court* could have accomplished this, since courts are necessarily confined to the parameters of the controversies before them (as was this Court in *Chapman*). Nor is it likely that *Congress* could study and resolve a thorny technical problem too small and intricate to merit full scale legislative attention, yet too big and unjust to be ignored. This is *why* Congress created the Commission: to resolve just the sort of technical problem which prompted the Commission to act and which still remains unresolved pending resolution by this Court. Unless the Commission is sustained in performing its task, the Federal penal and judicial systems will choke on sentencing minutia; for example, this is the second time that LSD sentencing has been before this Court.

This nation needs the Sentencing Commission to do what it did here, the Courts should encourage the Commission in doing so. This Court should sustain the Commission's rule. Amendment 488 should be applied to the penalty statute. The judgment below should be reversed.

September 20, 1995

Respectfully submitted:

DONALD THOMAS BERGERSON*
2431 Fillmore Street
San Francisco, CA., 94115
Telephone: (415) 621-8149

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* Counsel of record. Grateful acknowledgment is made to the following persons: Mark Cheffo, Judy Clarke, Michael Costello, Dean Stowers, Scott Wallace, Prof. David Yellen, and particularly to Prof. Marsha Cohen, Peter Goldberger, Tom Hutchinson, and Julie Stewart.

APPENDIX A

21 U.S.C. § 841

* * *

(b) Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving –

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of –

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or

(viii) 100 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 1 kilogram or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of

twice that authorized in accordance with the provisions of Title 18, or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving –

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of –

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP)or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight; or

(viii) 10 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 100 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that

authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include supervised release of at least 4 years in addition to such a term of imprisonment and shall, if to such a prior conviction, include a term of such release of at least 8 years in addition to such imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

* * *

APPENDIX B

18 U.S.C. § 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence. – The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider –

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed –

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for –

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code;

(5) any pertinent policy statement issued by the sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced;

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

* * *

APPENDIX C

28 U.S.C. § 991. United States Sentencing Commission; establishment and purposes

(a) There is established as an independent commission in the judicial branch of the United States a United States Sentencing Commission which shall consist of seven voting members and one nonvoting member. The President, after consultation with representatives of judges, prosecuting attorneys, defense attorneys, law enforcement officials, senior citizens, victims of crime, and others interested in the criminal justice process, shall appoint the voting members of the Commission, by and with the advice and consent of the Senate, one of whom shall be appointed, by and with the advice and consent of the Senate, as the Chair and three of whom shall be designated by the President as Vice Chairs. At least three of the members shall be Federal judges selected after considering a list of six judges recommended to the President by the Judicial Conference of the United States. Not more than four of the members of the Commission shall be members of the same political party, and of the three Vice Chairs, no more than two shall be members of the same political party. The Attorney General, or the Attorney General's designee, shall be an ex officio, nonvoting member of the Commission. The Chair, Vice Chairs, and members of the Commission shall be subject to removal from the Commission by the President only for neglect of duty or malfeasance in office or for other good cause shown.

(b) The purposes of the United States Sentencing Commission are to –

(1) establish sentencing policies and practices for the Federal criminal justice system that –

(A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;

(B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and

(C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process; and

(2) develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.

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28 U.S.C. § 992. Terms of office; compensation

(a) The voting members of the United States Sentencing Commission shall be appointed for six-year terms, except that the initial terms of the first members of the Commission shall be staggered so that –

(1) two members, including the Chair, serve terms of six years;

(2) three members serve terms of four years; and

(3) two members serve terms of two years.

(b)(1) Subject to paragraph (2) –

(A) no voting member of the Commission may serve more than two full terms; and

(B) a voting member appointed to fill a vacancy that occurs before the expiration of the term for which a predecessor was appointed shall be appointed only for the remainder of such term.

(2) A voting member of the Commission whose term has expired may continue to serve until the earlier of –

(A) the date on which a successor has taken office; or

(B) the date on which the Congress adjourns sine die to end the session of Congress that commences after the date on which the member's term expired.

(c) The Chair and Vice Chairs of the Commission shall hold full-time positions and shall be compensated during their terms of office at the annual rate at which judges of the United States courts of appeals are compensated. The voting members of the Commission, other than the Chair and Vice Chair, shall hold full-time positions until the end of the first six years after the sentencing guidelines go into effect pursuant to section 235(a)(1)(B)(ii) of the Sentencing Reform Act of 1984, and shall be compensated at the annual rate at which judges of the United States courts of appeals are compensated. Thereafter, the voting members of the Commission, other than the Chair and Vice Chairs, shall hold part-time

positions and shall be paid at the daily rate at which judges of the United States courts of appeals are compensated. A Federal judge may serve as a member of the Commission without resigning the judge's appointment as a Federal judge.

(d) Sections 44(c) and 134(b) of this title (relating to the residence of judges) do not apply to any judge holding a full-time position on the Commission under subsection (c) of this section.

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28 U.S.C. § 993. Powers and duties of Chair

The Chair shall –

(a) call and preside at meetings of the Commission, which shall be held for at least two weeks in each quarter after the members of the Commission hold part-time positions; and

(b) direct –

(1) the preparation of a requests for appropriations for the Commission; and

(2) the use of funds made available to the Commission.

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28 U.S.C. § 994. Duties of the Commission

(a) The Commission, by affirmative vote of at least four members of the Commission, and pursuant to its rules and regulations and consistent with all pertinent provisions of this title and title 18, United States Code, shall promulgate and distribute to all courts of the United States and to the United States Probation System –

(1) guidelines, as described in this section, for use of a sentencing court in determining the sentence to be imposed in a criminal case, including –

(A) a determination whether to impose a sentence to probation, a fine, or a term of imprisonment;

(B) a determination as to the appropriate amount of a fine or the appropriate length of a term of probation or a term of imprisonment;

(C) a determination whether a sentence to a term of imprisonment should include a requirement that the defendant be placed on a term of supervised release after imprisonment, and, if so, the appropriate length of such a term;

(D) a determination whether multiple sentences to terms of imprisonment should be ordered to run concurrently or consecutively; and

(E) a determination under paragraphs (6) and (11) of section 3563(b) of title 18;

(2) general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth in section 3553(a)(2) of title 18, United States Code, including the appropriate use of –

(A) the sanctions set forth in sections 3554, 3555, and 3556 of title 18;

(B) the conditions of probation and supervised release set forth in sections 3563(b) and 3583(d) of title 18;

(C) the sentence modification provisions set forth in sections 3563(c), 3564, 3573, and 3582(c) of title 18;

(D) the fine imposition provisions set forth in section 3572 of title 18;

(E) the authority granted under rule 11(c)(2) of the Federal Rules of Criminal Procedure to accept or reject a plea agreement entered into pursuant to rule 11(c)(1); and

(F) the temporary release provisions set forth in section 3622 of title 18, and the prerelease custody provisions set forth in section 3624(c) of title 18; and

(3) guidelines or general policy statements regarding the appropriate use of the provisions for revocation of probation set forth in section 3565 of title 18, and the provisions for modification of the terms or conditions of supervised release and revocation of supervised release set forth in section 3583(e) of title 18.

(b)(1) The Commission, in the guidelines promulgated pursuant to subsection(a)(1), shall for each category of offense involving each category of defendant, establish a sentencing range that is consistent with all pertinent provisions of title 18, United States Code.

(2) If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the

range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months, except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment.

(c) The Commission, in establishing categories of offenses for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release or imprisonment, shall consider whether the following matters, among others, have any relevance to the nature, extent, place of service, or other incidents[1] of an appropriate sentence, and shall take them into account only to the extent that they do have relevance –

(1) the grade of the offense;

(2) the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense;

(3) the nature and degree of the harm caused by the offense, including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust;

(4) the community view of the gravity of the offense;

(5) the public concern generated by the offense;

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[1] So in original. Probably should be "incidence".

(6) the deterrent effect a particular sentence may have on the commission of the offense by others; and

(7) the current incidence of the offense in the community and in the Nation as a whole.

(d) The Commission in establishing categories of defendants for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment, shall consider whether the following matters, among others with respect to a defendant, have any relevance to the nature, extent, place of service, or other incidents[1] of an appropriate sentence, and shall take them into account only to the extent that they do have relevance –

(1) age;

(2) education;

(3) vocational skills;

(4) mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant;

(5) physical condition, including drug dependence;

(6) previous employment record;

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[1] So in original. Probably should be "incidence".

(7) family ties and responsibilities;

(8) community ties;

(9) role in the offense;

(10) criminal history; and

(11) degree of dependence upon criminal activity for a livelihood.

The Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders.

(e) The Commission shall assure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant.

(f) The Commission, in promulgating guidelines pursuant to subsection (a)(1), shall promote the purposes set forth in section 991(b)(1), with particular attention to the requirements of subsection 991(b)(1)(B) for providing certainty and fairness in sentencing and reducing unwarranted sentence disparities.

(g) The Commission, in promulgating guidelines pursuant to subsection (a)(1) to meet the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code, shall take into account the nature and capacity of the penal, correctional, and other facilities and services available, and shall make recommendations concerning any change or expansion in the nature or capacity

of such facilities and services that might become necessary as a result of the guidelines promulgated pursuant to the provisions of this chapter. The sentencing guidelines prescribed under this chapter shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons, as determined by the Commission.

(h) The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and –

(1) has been convicted of a felony that is –

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.) and

(2) has previously been convicted of two or more prior felonies, each of which is –

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).

(i) The Commission shall assure that the guidelines specify a sentence to a substantial term of imprisonment for categories of defendants in which the defendant –

(1) has a history of two or more prior Federal, State, or local felony convictions for offenses committed on different occasions;

(2) committed the offense as part of a pattern of criminal conduct from which the defendant derived a substantial portion of the defendant's income;

(3) committed the offense in furtherance of a conspiracy with three or more persons engaging in a pattern of racketeering activity in which the defendant participated in a managerial or supervisory capacity;

(4) committed a crime of violence that constitutes a felony while on release pending trial, sentence, or appeal from a Federal, State, or local felony for which he was ultimately convicted; or

(5) committed a felony that is set forth in section 401 or 1010 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 841 and 960), and that involved trafficking in a substantial quantity of a controlled substance.

(j) The Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense, and the general appropriateness of imposing a term of imprisonment on a person convicted of a crime of violence that results in serious bodily injury.

(k) The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.

(l) The Commission shall insure that the guidelines promulgated pursuant to subsection (a)(1) reflect –

(1) the appropriateness of imposing an incremental penalty for each offense in a case in which a defendant is convicted of –

(A) multiple offenses committed in the same course of conduct that result in the exercise of ancillary jurisdiction over one or more of the offenses; and

(B) multiple offenses committed at different times, including those cases in which the subsequent offense is a violation of section 3146 (penalty for failure to appear) or is committed while the person is released pursuant to the provisions of section 3147 (penalty for an offense committed while on release) of title 18; and

(2) the general inappropriateness of imposing consecutive terms of imprisonment for an offense of conspiring to commit an offense or soliciting commission of an offense and for an offense that was the sole object of the conspiracy or solicitation.

(m) The Commission shall insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense.

This will require that, as a starting point in its development of the initial sets of guidelines for particular categories of cases, the Commission ascertain the average sentences imposed in such categories of cases prior to the creation of the Commission, and in cases involving sentences to terms of imprisonment, the length of such terms actually served. The Commission shall not be bound by such average sentences, and shall independently develop a sentencing range that is consistent with the purposes of sentencing described in section 3553(a)(2) of Title 18, United States Code.

(n) The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.

(o) The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section. In fulfilling its duties and in exercising its powers, the Commission shall consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system. The United States Probation System, the Bureau of Prisons, the Judicial Conference of the United States, the Criminal Division of the United States Department of Justice, and a representative of the Federal Public Defenders shall submit to the Commission any observations, comments, or questions pertinent to the work of the Commission whenever they believe such communication

would be useful, and shall, at least annually, submit to the Commission a written report commenting on the operation of the Commission's guidelines, suggesting changes in the guidelines that appear to be warranted, and otherwise assessing the Commission's work.

(p) The Commission, at or after the beginning of a regular session of Congress, but not later than the first day of May, may promulgate under subsection (a) of this section and submit to Congress amendments to the guidelines and modifications to previously submitted amendments that have not taken effect, including modifications to the effective dates of such amendments. Such an amendment or modification shall be accompanied by a statement of the reasons therefor and shall take effect on a date specified by the Commission, which shall be no earlier than 180 days after being so submitted and no later than the first day of November of the calendar year in which the amendment or modification is submitted, except to the extent that the effective date is revised or the amendment is otherwise modified or disapproved by Act of Congress.

(q) The Commission and the Bureau of Prisons shall submit to Congress an analysis and recommendations concerning maximum utilization of resources to deal effectively with the Federal prison population. Such report shall be based upon consideration of a variety of alternatives, including –

(1) modernization of existing facilities;

(2) inmate classification and periodic review of such classification for use in placing inmates in the

least restrictive facility necessary to ensure adequate security; and

(3) use of existing Federal facilities, such as those currently within military jurisdiction.

(r) The Commission, not later than two years after the initial set of sentencing guidelines promulgated under subsection (a) goes into effect, and thereafter whenever it finds it advisable, shall recommend to the Congress that it raise or lower the grades, or otherwise modify the maximum penalties, of those offenses for which such an adjustment appears appropriate.

(s) The Commission shall give due consideration to any petition filed by a defendant requesting modification of the guidelines utilized in the sentencing of such defendant, on the basis of changed circumstances unrelated to the defendant, including changes in –

(1) the community view of the gravity of the offense;

(2) the public concern generated by the offense; and

(3) the deterrent effect particular sentences may have on the commissions of the offense by others.

(t) The Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.

(u) If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced.

(v) The Commission shall ensure that the general policy statements promulgated pursuant to subsection (a)(2) include a policy limiting consecutive terms of imprisonment for an offense involving a violation of a general prohibition and for an offense involving a violation of a specific prohibition encompassed within the general prohibition.

(w) The appropriate judge of officer shall submit to the Commission in connection with each sentence imposed (other than a sentence imposed for a petty offense, as defined in title 18, for which there is no applicable sentencing guideline) a written report of the sentence, the offense for which it is imposed, the age, race, and sex of the offender, information regarding factors made relevant by the guidelines, and such other information as the Commission finds appropriate. The Commission shall submit to Congress at least annually an analysis of these reports and any recommendations for legislation that the Commission concludes is warranted by that analysis.

(x) The provisions of section 553 of title 5, relating to publication in the Federal Register and public hearing procedure, shall apply to the promulgation of guidelines pursuant to this section.

(y) The Commission, in promulgating guidelines pursuant to subsection (a)(1), may include, as a component of a fine, the expected costs to the Government of any imprisonment, supervised release, or probation sentence that is ordered.

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28 U.S.C. § 995. Powers of the Commission

(a) The Commission, by vote of a majority of the members present and voting, shall have the power to –

(1) establish general policies and promulgate such rules and regulations for the Commission as are necessary to carry out the purposes of this chapter;

(2) appoint and fix the salary and duties of the Staff Director of the Sentencing Commission, who shall serve at the discretion of the Commission and who shall be compensated at a rate not to exceed the highest rate now or hereafter prescribed for Level 6 of the Senior Executive Service Schedule (5 U.S.C. 5382);

(3) deny, revise, or ratify any request for regular, supplemental, or deficiency appropriations prior to any submission of such request to the Office of Management and Budget by the Chair;

(4) procure for the Commission temporary and intermittent services to the same extent as is authorized by section 3109(b) of title 5, United States Code;

(5) utilize, with their consent, the services, equipment, personnel, information, and facilities of

other Federal, State, local, and private agencies and instrumentalities with or without reimbursement therefor:

(6) without regard to 31 U.S.C. 3324, enter into and perform such contracts, leases, cooperative agreements, and other transactions as may be necessary in the conduct of the functions of the Commission, with any public agency, or with any person, firm, association, corporation, educational institution, or nonprofit organization;

(7) accept and employ, in carrying out the provisions of this title, voluntary and uncompensated services, notwithstanding the provisions of 31 U.S.C. 1342, however, individuals providing such services shall not be considered Federal employees except for purposes of chapter 81 of title 5, United States Code, with respect to job-incurred disability and title 28, United States Code, with respect to tort claims;

(8) request such information, data, and reports from any Federal agency or judicial officer as the Commission may from time to time require and as may be produced consistent with other law;

(9) monitor the performance of probation officers with regard to sentencing recommendations, including application of the Sentencing Commission guidelines and policy statements;

(10) issue instructions to probation officers concerning the application of Commission guidelines and policy statements;

(11) arrange with the head of any other Federal agency for the performance by such agency of any function of the Commission, with or without reimbursement;

(12) establish a research and development program within the Commission for the purpose of –

(A) serving as a clearinghouse and information center for the collection, preparation, and dissemination of information on Federal sentencing practices; and

(B) assisting and serving in a consulting capacity to Federal courts, departments, and agencies in the development, maintenance, and coordination of sound sentencing practices;

(13) collect systematically the data obtained from studies, research, and the empirical experience of public and private agencies concerning the sentencing process;

(14) publish data concerning the sentencing process;

(15) collect systematically and disseminate information concerning sentences actually imposed, and the relationship of such sentences to the factors set forth in section 3553(a) of title 18, United States Code;

(16) collect systematically and disseminate information regarding effectiveness of sentences imposed;

(17) devise and conduct, in various geographical locations, seminars and workshops providing continuing studies for persons engaged in the sentencing field;

(18) devise and conduct periodic training programs of instructions in sentencing techniques for judicial and probation personnel and other persons connected with the sentencing process;

(19) study the feasibility of developing guidelines for the disposition of juvenile delinquents;

(20) make recommendations to Congress concerning modification or enactment of statutes relating to sentencing, penal, and correctional matters that the Commission finds to be necessary and advisable to carry out an effective, humane and rational sentencing policy;

(21) hold hearings and call witnesses that might assist the Commission in the exercise of its powers or duties;

(22) perform such other functions as are required to permit Federal courts to meet their responsibilities under section 3553(a) of title 18, United States Code, and to permit others involved in the Federal criminal justice system to meet their related responsibilities;

(23) retain private attorneys to provide legal advice to the Commission in the conduct of its work, or to appear for or represent the Commission in any case in which the Commission is authorized by law to represent itself, or in which the Commission is representing itself with the consent of the Department of Justice; and the Commission may in its discretion pay reasonable attorney's fees to private attorneys employed by it out of its appropriated funds. When serving as officers or employees of the United States, such private attorneys shall be considered special government employees as defined in section 202(a) of title 18; and

(24) grant incentive awards to its employees pursuant to chapter 45 of title 5, United States Code.

(b) The Commission shall have such other powers and duties and shall perform such other functions as may

be necessary to carry out the purposes of this chapter, and may delegate to any member or designated person such powers as may be appropriate other than the power to establish general policy statements and guidelines pursuant to section 994(a)(1) and (2), the issuance of general policies and promulgation of rules and regulations pursuant to subsection (a)(1) of this section, and the decisions as to the factors to be considered in establishment of categories of offenses and offenders pursuant to section 994(b). The Commission shall, with respect to its activities under subsections (a)(9), (a)(10), (a)(11), (a)(12), (a)(13), (a)(14), (a)(15), (a)(16), (a)(17), and (a)(18), to the extent practicable, utilize existing resources of the Administrative Office of the United States Courts and the Federal Judicial Center for the purpose of avoiding unnecessary duplication.

(c) Upon the request of the Commission, each Federal agency is authorized and directed to make its services, equipment, personnel, facilities, and information available to the greatest practicable extent to the Commission in the execution of its functions.

(d) A simple majority of the membership then serving shall constitute a quorum for the conduct of business. Other than for the promulgation of guidelines and policy statements pursuant to section 994, the Commission may exercise its powers and fulfill its duties by the vote of a simple majority of the members present.

(e) Except as otherwise provided by law, the Commission shall maintain and make available for public inspection a record of the final vote of each member on any action taken by it.

APPENDIX D

United States Sentencing Guidelines section 2D1.1(c) sets out a weight-based table of sentences for violations of 21 USC § 841(b)(1)(A), (B), and further provides as follows:

"In the case of LSD on a carrier medium (*e.g.*, a sheet of blotter paper), do not use the weight of the LSD/carrier medium. Instead, treat each dose of LSD on the carrier medium as equal to 0.4 mg. of LSD for the purposes of the Drug Quantity Table."

Commentary: Application Note 18 to § 2D1.1 provides:

"LSD on a blotter paper carrier medium typically is marked so that the number of doses ("hit") per sheet can readily be determined. When this is not the case, it is to be presumed that each 1/4 inch by 1/4 inch section of the blotter paper is equal to one dose.

"In the case of liquid LSD (LSD that has not been placed onto a carrier medium), using the weight of the LSD alone to calculate the offense level may not adequately reflect the seriousness of the offense. In such a case, and [sic] upward departure may be warranted."

The relevant portion of the *Commentary: Background* to § 2D1.1(c) provides as follows:

* * *

Because the weights of LSD carrier media vary widely and typically far exceed the weight of the controlled substance itself, the Commission has determined that basing offense levels on the entire weight of the LSD and carrier medium would produce unwarranted disparity among offenses involving the same quantity of actual LSD (but different carrier

weights), as well as sentences disproportionate to those for other, more dangerous controlled substances, such as PCP. Consequently, in cases involving LSD contained in a carrier medium, the Commission has established a weight per dose of 0.4 milligram for purposes of determining the base offense level.

The dosage weight of LSD selected exceeds the Drug Enforcement Administration's standard dosage unit for LSD of 0.05 milligram (i.e., the quantity of actual LSD per dose) in order to assign some weight to the carrier medium. Because LSD typically is marketed and consumed orally on a carrier medium, the inclusion of some weight attributable to the carrier medium recognizes (A) that offense levels for most other controlled substances are based upon the weight of the mixture containing the controlled substance without regard to purity, and (b) the decision in Chapman v. United States, 111 S. Ct. 1919 (1991) (holding that the term "mixture or substance" in 21 U.S.C. § 841(b)(1) includes the carrier medium in which LSD is absorbed). At the same time the weight per dose selected is less than the weight per dose that would equate the offense level for LSD on a carrier medium with that for the same number of doses of PCP, a controlled substance that comparative assessments indicate is more likely to induce violent acts and ancillary crime than is LSD. (Treating LSD on a carrier medium as weighing 0.5 milligram per dose would produce offense levels equivalent to those for PCP.) Thus, the approach decided upon by the Commission will harmonize offense levels for LSD offenses with those for other controlled substances and avoid an undue influence of varied carrier weight on the applicable offense level. Nonetheless, this approach does not override the applicability of "mixture or substance" for the

purpose of applying any mandatory minimum sentence (see Chapman; §5G1.1(b)).